

OPINION NO. 2012-028**Syllabus:**

2012-028

Pursuant to R.C. 4141.22, information that is (1) maintained by the Ohio Department of Job and Family Services and provided to the Unemployment Compensation Review Commission by the Department and (2) placed in a director's file, review file, or decision of the Commission is not a public record that must be made available for public inspection and copying under R.C. 149.43. Information in a director's file, review file, or decision of the Commission that is not subject to the confidentiality provision of R.C. 4141.22 is a public record for purposes of R.C. 149.43, unless the information is not a "record," as defined in R.C. 149.011(G), or the information falls within one of the exceptions to the definition of the term "public record" set forth in R.C. 149.43(A)(1).

To: Sylvester D. Patton, Chairman, Unemployment Compensation Review Commission, Columbus, Ohio

By: Michael DeWine, Ohio Attorney General, September 10, 2012

You have requested an opinion regarding public access to information kept by, and the written decisions of, the Unemployment Compensation Review Commission (UCRC). The information you are concerned about is received or prepared by the UCRC when an unemployment compensation appeal is transferred from the Ohio Department of Job and Family Services (ODJFS) to the UCRC pursuant to R.C. 4141.281. When a case is appealed to the UCRC, information pertinent to the case is maintained by the UCRC in a director's file and a review file.¹ The UCRC uses the information in these files to prepare a written decision in a case.² R.C. 4141.281(C).

Under federal and state law, the governmental entities that administer Ohio's unemployment compensation law are required to maintain the confidentiality of certain information. *See* 20 C.F.R. 603.4; R.C. 4141.21-.22. In light of these confidentiality laws, you wish to know whether the information in a director's file, review file, or written decision of the UCRC is a public record that must be made available for public inspection and copying under R.C. 149.43.

R.C. 149.43(B)(1) requires a public office to make its public records available for public inspection and copying:

¹ The Unemployment Compensation Review Commission (UCRC) maintains a director's file and a review file with respect to each case appealed to it. 10B Ohio Admin. Code 4146-17-01(A). As explained in your letter, the same information may appear in both the director's file and the review file. *See* R.C. 4141.281(C)(3); 10B Ohio Admin. Code 4141-27-09(A); 10B Ohio Admin. Code 4146-7-01.

² The written decisions of the UCRC are prepared by members of the commission, acting either individually or collectively; hearing officers; or members of the commission and hearing officers acting jointly. *See* R.C. 4141.06; R.C. 4141.281(C).

Upon request and subject to division (B)(8) of this section [(limiting the duty of a public office to provide certain public records to incarcerated persons)], all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.

R.C. 149.43 thus requires a public office to make its public records available to any person for inspection at all reasonable times during normal business hours, and, upon request, to make copies of such records, at cost, within a reasonable period of time.

For purposes of R.C. 149.43, the term “public office” includes, unless otherwise specified, “any state agency.” R.C. 149.011(A). The term “state agency,” as used in R.C. 149.011(A), means a “department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government.” R.C. 149.011(B). Under these definitions, if the UCRC is a commission established by Ohio law to exercise a function of state government, the UCRC is a public office for purposes of R.C. 149.43.

The UCRC is a commission established by statute and composed of members appointed by the Governor. R.C. 4141.06. The UCRC participates in the administration of Ohio’s unemployment compensation law by hearing appeals “arising from determinations of the director of [ODJFS] involving claims for [unemployment] compensation and other unemployment compensation issues.” *Id*; see R.C. 4141.281; 10B Ohio Admin. Code 4146-1-01; 10B Ohio Admin. Code 4146-3-02; 10B Ohio Admin. Code 4146-5-03(A). See generally 42 U.S.C.S. § 503(a)(3) (federal unemployment compensation law requires a state to provide an “[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied”). Given the UCRC is established by Ohio law to exercise a function of state government, the UCRC is a public office for purposes of R.C. 149.43.

This means that the UCRC is required to comply with the inspection and copying requirements of R.C. 149.43 with regard to its public records. As used in R.C. 149.43, the term “public record” means, with certain exceptions, “records kept by any public office.” R.C. 149.43(A)(1). For purposes of R.C. 149.43, “record” means “any document, device, or item, regardless of physical form or characteristic, . . . created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activi-

ties of the office.” R.C. 149.011(G) (emphasis added). Accordingly, if a director’s file, review file, or written decision of the UCRC is “kept by” the UCRC and “serves to document the organization, functions, policies, decisions, procedures, operations, or other activities” of the UCRC, the file or written decision is a public record for purposes of R.C. 149.43.

The UCRC is required to maintain in each case a director’s file and a review file. 10B Ohio Admin. Code 4146-17-01(A); *see* R.C. 4141.281(C)(3). The director’s file includes the following:

- (1) The determination or redetermination under appeal;
- (2) All information in the file pertaining to, or upon which, the determination or redetermination was based;
- (3) Any information, received by the director prior to the transfer of the request for redetermination/appeal to the commission, that relates to the facts or circumstances upon which the determination or redetermination was based.

10B Ohio Admin. Code 4141-27-09(C). The review file includes the “appeal, request for review or an application for appeal, all exhibits introduced at the hearing, the transcript where it exists and any other documents pertaining to the case that are submitted or generated after an appeal, application for appeal or request for review has been filed.” Rule 4146-17-01(A); *see* R.C. 4141.17; R.C. 4141.281(C)(3); 10B Ohio Admin. Code 4146-5-08; 10B Ohio Admin. Code 4146-7-01; 10B Ohio Admin. Code 4146-7-02.

Further, as observed by one Attorney General, a director’s file or review file “of the Unemployment Compensation Board of Review [(now UCRC)] ordinarily will consist of a variety of materials and items pertaining to a party’s claim for unemployment benefits, which serve to document both the initial handling of the claim by the Bureau of Employment Services [(now ODJFS)], and subsequent proceedings before the Board of Review with respect to the merits of the claim.” 1986 Op. Att’y Gen. No. 86-033 at 2-170 and 2-171. This typically will include the following:

copies of notices of appeal to the Board of Review and the court of common pleas, copies of notices of hearings before the Administrator [(now director of ODJFS)] or his deputy and the Board of Review, written statements of the claimant and other parties, obtained by the Bureau of Employment Services for the purpose of making an initial determination on the claimant’s application for benefits, transcripts of testimony of the claimant and other parties before the Administrator or his deputy and the Board of Review, copies of the Administrator’s initial determination on the claimant’s application for benefits and the Administrator’s subsequent decision on reconsideration, copies of the decision of the Board of Review on appeal, and copies of all correspondence relative to the case.

Id. at 2-171. *See generally* R.C. 4141.06 (the UCRC “shall have access to only the records of the [ODJFS] that are necessary for the administration of [R.C. Chapter 4141] and needed in the performance of its official duties. The [UCRC] shall have the right to request of the director [of ODJFS] necessary information from any work unit of the department having that information”).

Insofar as a director’s file or review file contains information the UCRC receives and uses to make determinations in an unemployment compensation appeal that is transferred from ODJFS to the UCRC, such a file is kept by, and serves to document a primary function of, the UCRC. *See* 1986 Op. Att’y Gen. No. 86-033 at 2-171 (hearing records of the Unemployment Compensation Board of Review (now UCRC) serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the UCRC). *See generally* 1997 Op. Att’y Gen. No. 97-010 at 2-57 (“the Bureau of Workers’ Compensation (Bureau) is a public office, and workers’ compensation claim files are records since they serve to document the decisions, procedures, operations and other activities of the Bureau”). A director’s file or review file of the UCRC thus is a public record for purposes of R.C. 149.43.

A written decision of the UCRC is a document or item that affirms, modifies, or reverses a prior decision in an unemployment compensation case. 10B Ohio Admin. Code 4146-9-01(A); *see* R.C. 4141.281(C). A written decision is “based upon evidence in the record, and consideration of arguments on the record,” and sets “forth findings of fact and the reasons for the legal conclusions reached on the issues.” 10B Ohio Admin. Code 4146-9-01(A); *see* R.C. 4141.281(C). Once a written decision is prepared, the UCRC must keep a copy of it on file. Rule 4146-9-01(D). A written decision of the UCRC thus is kept by, and serves to document a decision of, the UCRC in an unemployment compensation case, and, is a public record for purposes of R.C. 149.43. *See generally id.* (“[c]opies of decisions of hearing officers and decisions and orders of the [UCRC] shall be kept on file at the office of the [UCRC]”). *See generally also* R.C. 4141.28(H) (“[i]n making determinations, the director [of ODJFS] shall follow decisions of the [UCRC] which have become final with respect to claimants similarly situated”).

Although a director’s file, review file, or written decision of the UCRC is a public record that must be made available for public inspection and copying under R.C. 149.43, the file or decision may contain particular information that the public is prohibited from accessing. First, if “personal information about private citizens in the possession of a public office does not serve ‘to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office,’ R.C. 149.011(G), the information is neither a ‘record’ of that office nor a ‘public record’ of that office for purposes of R.C. 149.43.” 2004 Op. Att’y Gen. No. 2004-045 at 2-391; *accord State ex rel. Beacon Journal Publ’g Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002); *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000); *see* 2007 Op. Att’y Gen. No. 2007-026 at 2-271; 2005 Op. Att’y Gen. No. 2005-047. Accordingly, information in a director’s file, review file, or written decision of the UCRC that does not serve to document the organization, functions, policies, decisions, procedures, operations,

or other activities of the UCRC is not a public record that must be made available for public inspection and copying under R.C. 149.43.

In addition, “the General Assembly has excluded from the meaning of ‘public record’ certain types of information, even though they are kept by, and may document the functions of, a public office.” 2007 Op. Att’y Gen. No. 2007-026 at 2-272; *see* R.C. 149.43(A)(1). For example, pursuant to R.C. 149.43(A)(1), medical records, trial preparation records, confidential law enforcement investigatory records, intellectual property records, donor profile records, and records the release of which is prohibited by state or federal law are not public records. With the exception of the exemption for “[r]ecords the release of which is prohibited by state or federal law,” R.C. 149.43(A)(1)(v), none of the exceptions established by the General Assembly applies to information in a director’s file, review file, or written decision of the UCRC.

Under federal law, Ohio is required to have a “provision for maintaining the confidentiality of any [unemployment compensation] information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part.” 20 C.F.R. 603.4(b); *see* 42 U.S.C.S. § 503. Additionally, Ohio law must contain provisions that are interpreted and applied consistently with 20 C.F.R. 603.4(b) and “must provide penalties for any disclosure of confidential [unemployment compensation] information that is inconsistent with any provision of [subpart B of part 603 of the Code of Federal Regulations].” 20 C.F.R. 603.4(c).

Ohio has two statutes to protect the confidentiality of the information described in 20 C.F.R. 603.4(b). R.C. 4141.21 states:

Except as provided in [R.C. 4141.162], and subject to [R.C. 4141.43], the information maintained by the director of [ODJFS] or furnished to the director by employers or employees pursuant to [R.C. Chapter 4141] is for the exclusive use and information of [ODJFS] in the discharge of its duties and shall not be open to the public or be used in any court in any action or proceeding pending therein, or be admissible in evidence in any action, other than one arising under this chapter or [R.C. 5733.42].

See generally State ex rel. Callos Staffing Co., LLC v. ODJFS, Case No. 11 MA 5, 2011-Ohio-3662, 2011 Ohio App. LEXIS 3105, ¶4 (Mahoning County July 13, 2011) (pursuant to R.C. 4141.21, information provided to ODJFS is not a public record that the public has a right to access); *Wiggins v. Ohio Bureau of Employment Serv.*, 80 Ohio App. 3d 829, 832, 610 N.E.2d 1150 (Lucas County 1992) (same as the previous parenthetical); 2010 Op. Att’y Gen. No. 2010-029 at 2-211 n.1 (“R.C. 4141.21 is intended to ‘preserve the right of privacy of the individuals, be they employers or employees, who are required to furnish information’ to ODJFS” (quoting *Ohio Civil Rights Comm’n v. Campbell*, 46 Ohio App. 2d 110, 113, 345 N.E.2d 438 (Franklin County 1975))).

R.C. 4141.22(A) provides further that “[n]o person shall disclose any information that was maintained by the director of [ODJFS] or furnished to the director by employers or employees pursuant to [R.C. Chapter 4141], unless such disclosure is permitted under [R.C. 4141.21].” A person who violates R.C. 4141.22(A) is disqualified from holding any appointment or employment by the ODJFS or a county family services agency or workforce development agency, R.C. 4141.22(B), and may be fined or imprisoned, R.C. 4141.99(B).

The General Assembly has not separately defined the term “person” for purposes of R.C. 4141.22(A). R.C. 1.59(C) provides that the term “person,” as used in any statute, unless another definition is provided in such statute or a related statute, “includes an individual, corporation, business trust, estate, trust, partnership, and association.” Courts and prior Attorneys General have determined that insofar as R.C. 1.59(C)’s definition of person does not, in and of itself, either clearly include or exclude governmental bodies, it is appropriate to consider the purpose, language, and context of a statute to determine whether the term “person” should be interpreted broadly to include governmental bodies. *See Galanos v. City of Cleveland*, 70 Ohio St. 3d 220, 222, 638 N.E.2d 530 (1994); *City of Dayton v. McPherson*, 29 Ohio Misc. 190, 202-03, 280 N.E.2d 106 (C.P. Montgomery County 1970); 1993 Op. Att’y Gen. No. 93-047 at 2-230; 1992 Op. Att’y Gen. No. 92-019 at 2-66; 1990 Op. Att’y Gen. No. 90-045 at 2-192; 1979 Op. Att’y Gen. No. 79-062 at 2-209.

R.C. 4141.22(A) is part of a comprehensive statutory plan to administer Ohio’s unemployment compensation law. Under this plan, various statutes authorize ODJFS to provide public or private entities with confidential unemployment compensation information ODJFS maintains or receives from employers or employees pursuant to R.C. Chapter 4141. *See, e.g.*, R.C. 4141.06; R.C. 4141.281; R.C. 4141.43; 10B Ohio Admin. Code 4141-43-01; 10B Ohio Admin. Code 4141-43-02; 10B Ohio Admin. Code 4141-43-03. *See generally* 2010 Op. Att’y Gen. No. 2010-029 (syllabus) (ODJFS, “in support of civil or criminal prosecutions arising out of investigations by the Bureau of Workers’ Compensation, may provide certified copies of employer payroll records to the Bureau or the appropriate prosecuting attorney”). Given that the purpose of R.C. 4141.21-22 is to preserve the privacy rights of persons who submit unemployment compensation information to ODJFS, it reasonably follows that interpreting the term “person,” as used in R.C. 4141.22, as including governmental bodies is consistent with that purpose. *See generally* R.C. 4141.46 (“[R.C. 4141.01-.46] shall be liberally construed”). Accordingly, pursuant to R.C. 4141.22, information that is maintained by ODJFS or furnished to ODJFS by employers or employees pursuant to R.C. Chapter 4141, and then provided to the UCRC, may not be disclosed to the public. *See Ohio Civil Rights Comm’n v. Campbell* (information certified to the Unemployment Compensation Board of Review (now UCRC) retains its confidential nature); *see also Barilla v. Patella*, 144 Ohio App. 3d 524, 760 N.E.2d 898 (Cuyahoga County 2001) (information furnished by ODJFS to the UCRC is subject to the privilege set forth in R.C. 4141.21). *See generally* rule 4146-17-01(E) (an interested party that reviews a director’s file or review file prior to a hearing is permitted to examine and copy information in the file “only for purposes relating to [R.C. Chapter 4141]”).

For this reason, when an unemployment compensation appeal is transferred from ODJFS to the UCRC in accordance with R.C. 4141.281, the information provided by ODJFS to the UCRC is not a public record because R.C. 4141.22 prohibits the public from inspecting and copying it.³ R.C. 149.43(A)(1)(v). *See generally* 1997 Op. Att’y Gen. No. 97-010 (syllabus, paragraph 2) (“[i]nformation in a workers’ compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition is not a public record, as defined in R.C. 149.43(A)(1), which the Bureau of Workers’ Compensation must disclose to the public under R.C. 149.43(B)”). Moreover, as no other federal or state law explicitly prohibits the UCRC from disclosing information the UCRC keeps in an unemployment compensation case, any information that is not subject to the confidentiality provision of R.C. 4141.22 is a public record for purposes of R.C. 149.43, unless the information is not a “record,” as defined in R.C. 149.011(G), or the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1). *See generally Ohio Civil Rights Comm’n v. Campbell*, 46 Ohio App. 2d at 114 (testimony that has been transcribed in writing and evidence received directly by the Unemployment Compensation Board of Review (now UCRC) or a referee to whom a case has been referred is not subject to R.C. 4141.21 or any other statute against the furnishing of the transcript to a plaintiff).⁴

Therefore, pursuant to R.C. 4141.22, information that is (1) maintained by ODJFS and provided to the UCRC by ODJFS and (2) placed in a director’s file,

³ Although the confidentiality requirement of 20 C.F.R. § 603.4(b) does not apply to “appeals records and decisions” of the UCRC, *see* 20 C.F.R. § 603.5(b), the information in such records and decisions remains subject to the confidentiality provisions of R.C. 4141.22. *See* 20 C.F.R. § 603.5 (disclosure of confidential unemployment compensation information pursuant to 20 C.F.R. § 603.5(b) is permissible “only if authorized by State law”); 2005 Fla. Op. Att’y Gen. No. 2005-42, 2005 Fla. AG LEXIS 42, at *16 (nothing in 20 C.F.R. § 603.5(b), as initially proposed, prohibits “states from making agency hearings or hearing records confidential as a matter of state law or practice”).

⁴ *Ohio Civil Rights Comm’n v. Campbell*, 46 Ohio App. 2d 110, 345 N.E.2d 438 (Franklin County 1975) was decided before R.C. 4141.22 prohibited a person from disclosing information that was maintained by the Ohio Department of Job and Family Services (ODJFS) or furnished to ODJFS by employers or employees pursuant to R.C. Chapter 4141. *See* 1985-1986 Ohio Laws, Part III, 5716, 5740 (Am. Sub. H.B. 766, eff. Dec. 17, 1986, with certain sections effective on other dates) (amending R.C. 4141.22 to prohibit a person from disclosing information that was maintained by the Bureau of Employment Services (now ODJFS) or furnished to the bureau by employers or employees pursuant to R.C. Chapter 4141). Thus, this case did not consider whether the language of R.C. 4141.22 prohibiting a person from disclosing information that was maintained by ODJFS or furnished to ODJFS by employers or employees requires the UCRC to redact such information from testimony that has been transcribed in writing and evidence received directly by the UCRC in a hearing.

review file, or decision of the UCRC is not a public record that must be made available for public inspection and copying under R.C. 149.43. Information in a director's file, review file, or decision of the UCRC that is not subject to the confidentiality provision of R.C. 4141.22 is a public record for purposes of R.C. 149.43, unless the information is not a "record," as defined in R.C. 149.011(G), or the information falls within one of the exceptions to the definition of the term "public record" set forth in R.C. 149.43(A)(1). *See generally* 1997 Op. Att'y Gen. No. 97-010 (syllabus, paragraph 1) ("[i]nformation within a workers' compensation claim file that does not fall within one of the exemptions listed in R.C. 149.43(A)(1) is a public record which must be disclosed to the public pursuant to R.C. 149.43(B) when the Bureau of Workers' Compensation, a member of the Industrial Commission, the claimant, or the employer has authorized the examination of the claim file as required by R.C. 4123.88").

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 4141.22, information that is (1) maintained by the Ohio Department of Job and Family Services and provided to the Unemployment Compensation Review Commission by the Department and (2) placed in a director's file, review file, or decision of the Commission is not a public record that must be made available for public inspection and copying under R.C. 149.43. Information in a director's file, review file, or decision of the Commission that is not subject to the confidentiality provision of R.C. 4141.22 is a public record for purposes of R.C. 149.43, unless the information is not a "record," as defined in R.C. 149.011(G), or the information falls within one of the exceptions to the definition of the term "public record" set forth in R.C. 149.43(A)(1).